

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of:

PAGEMART, INC.

Request for a Pioneer's Preference
Regarding its Petition for Rulemaking
to Allocate 800 MHz in the 930-931 MHz Band
and to Establish Rules and Policies for a New
Nationwide & Local Personal Information
Messaging Service

ET Docket No. 92-100
PP-40

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PAGEMART's MOTION TO STRIKE FORMAL OPPOSITION
AND REPLY COMMENTS

Pagemart, Inc. ("PageMart"), by its attorneys, hereby moves to strike the formal opposition and reply comments filed June 16, 1992 by Mobile Telecommunication Technologies Corporation ("MTel").¹ For the reasons that follow, MTel's "Formal Opposition" was untimely filed in violation of Section 1.402(e) of the Commission's Rules, and its so-called "Reply Comments" are in fact comments on PageMart's initial pioneer's preference request, due by June 1, 1992 under the Commission's comment schedule in this proceeding. MTel's procedural gambit is designed unfairly to preempt response to its comments and should not be sanctioned by this Commission.

**I. MTEL's FORMAL OPPOSITION WAS DUE NO LATER THAN JUNE 1
PURSUANT TO SECTION 1.402(e) OF THE RULES**

Section 1.402(e) of the Commission's Rules establishes the time schedule for filings related to a pioneer's preference request. "Any interested party" may file "in

¹ Formal Opposition and Reply Comments of Mobile Telecommunication Technologies Corporation, ET Docket No. 92-100, PP-40 (filed June 16, 1992) ("MTel Opposition")

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opposition to" a preference request in accordance with the "filing deadlines that shall be published in the 'Public Notice.'" 47 C.F.R. § 1.402(e)(1992). In this case, the Chief Engineer's April 30, 1992 Public Notice (Mimeo No. 22915) established June 1, 1992 as the last date for filing comments on all of the preference requests consolidated into ET Docket No. 92-100, including PageMart's. By its terms, Section 1.402(e) therefore established June 1 as the deadline for filing any "opposition" to PageMart's pioneer's preference request. Since MTel, despite notice of the Commission-imposed schedule, opted not to file by the June 1 deadline, its Formal Opposition is time-barred and must be stricken from the record of this proceeding.

The plain purpose of Section 1.402(e) fully supports this straightforward application of the unambiguous language of the rule. The purpose of the rule is to ensure an orderly schedule for the filing of supporting and opposition pleadings which permits all parties an opportunity to "reply to such statements." 47 C.F.R. § 1.402(e)(1992). By choosing unilaterally to wait until the last day of the reply period to file its Formal Opposition, MTel has sought to preclude opposing parties from exercising the right of reply—under the Commission's timetable—which Section 1.402(e) was designed to safeguard.

Even if MTel's "Formal Opposition" is not an "opposition" statement within the meaning of Section 1.402(e)—a conclusion which is almost absurd on its face—the Public Notice comment schedule still required a June 1 filing. A "formal opposition" is in reality a form of comment on a pioneer's preference request; indeed, in this case, MTel's "opposition" is integrated with its so-called "reply

comments" in a single document.² Since as further discussed below, all of the substance of MTel's filing was directed at critique and criticism of PageMart's initial pioneer's preference request and petition for rulemaking, the pleading must be considered an opening comment for purposes of the Public Notice schedule. MTel cannot unilaterally choose its own comment schedule and, despite being represented by a former Commissioner, cannot grant itself an extension of time to file.³

The only argument MTel can conceivably present is that a "formal opposition" is appropriately filed in the reply comment round or that, under Section 1.1202(e), there has been no "time period . . . prescribed" for filing a "formal opposition," and that MTel could therefore file whenever it chose. The reply round deadline cannot serve as the appropriate time period, however, because the Commission's filing schedule would therefore operate to deprive parties of the opportunity to respond to formal oppositions, as well as because an opposition is a comment on the initial request, not a reply to other comments.⁴

Arguing that there is no deadline whatsoever for the filing of formal oppositions is equally implausible, in light of the June 1 deadline for comments, as specified by the April 30 Public Notice, the substantive provisions of section 1.402(e),

² Indeed, MTel's pleading does not distinguish between opposition and comments, making it impossible for the Commission to judge which portions of the document have been submitted for which purpose.

³ The Commission's general rule on comment periods for petitions, Section 1.405(a), also makes clear that "oppositions" are due within 30 days of public notice, under which a "formal opposition" would obviously be due within 30 days. Until amended in February, the Commission's pioneer preference rules expressly adopted Section 1.405(a)'s time periods. See 47 C.F.R. § 1.402(c)(amended Feb. 26, 1992). The February amendment was neither expressly nor implicitly designed to change the substance of the timing requirements.

⁴ See Section II below.

and the policy behind section 1.402(e). Permitting a party to file a formal opposition to a pioneer's preference request whenever it chose, and without regard to the comment schedule, would allow the opponent to derail the Commission's orderly consideration of the proposal by submitting the opposition immediately prior to the Commission's substantive decision on the request. If rules of procedure are to have any meaning, then the deadline prescribed by the Public Notice must be the time period "prescribed" for the filing of oppositions under Section 1.1202(e).

II. MTEL'S PURPORTED "REPLY COMMENTS" ARE UNTIMELY COMMENTS ON THE PAGEMART PIONEER'S PREFERENCE REQUEST, NOT "REPLY" TO OTHER COMMENTS

There is no question that "comments" on all of the pioneer's preference requests consolidated into ET Docket No. 92-100 were due by June 1, 1992 under the express terms of the Commission's Public Notice. Rather than file opening comments, however, MTel informed the Commission that it would "defer addressing the merits of each proposal" until the reply round.⁵ Thus, rather than file timely comments, MTel unilaterally determined not to file, but rather to await the reply round to make its first substantive critique of competing proposal.⁶ MTel

⁵ Comments of MTel, at 2, ET Docket No. 92-100 (filed June 1, 1992).

⁶ MTel claimed that it was not able to comment on the pioneer's preference requests because it needed to review the "technical feasibility demonstrations" to be filed on June 1, 1992. MTel Comments, at 2. MTel's suggestion that the Commission's pioneer preference rules require a separate filing of a technical feasibility demonstration is erroneous, however; Section 1.402(a) requires a pioneer's preference to demonstrate feasibility, but makes no requirement for separate submission of a "feasibility demonstration." In fact, the rule states that feasibility analysis should "accompany" the preference request, as PageMart complied with by submitting extensive technical appendices with its February and March, 1992 petition for rulemaking and pioneer's preference request. In any event, no other party to ET Docket No. 92-100 was prevented from submitting comments (sometimes extensive) "addressing the merits" of the various proposals as required by June 1, 1992. MTel's claimed inability is therefore in reality an improper attempt to secure for itself a procedural advantage by shielding its comments from response by its opponents. PageMart has previously objected to MTel's procedural gamesmanship. PageMart Reply Comments, at 10 n. 9, ET Docket No. 92-100 (filed June 16, 1992).

did not request and was not granted any extension of time to file comments “addressing the merits” of the various pioneer’s preference requests, and cannot do so by the transparent expedient of captioning its comments as “reply comments.”

Any realistic definition of “reply” comments is that they are comments which “reply” to the comments filed by other parties. Indeed, the Commission’s rules clearly provide that reply comments are “in reply to the original comments.” 47 C.F.R. § 1.415(c)(1991).⁷ Instead of replying to the original comments, however, MTel’s purported “reply comments,” as it concedes, “address[] the merits” of the original proposals.

Both the language and substance of MTel’s “reply comments” make this conclusion self-evident. MTel’s states that its June 16 filing constitutes “reply comments to the above-captioned Pioneer’s Preference Request Filed [sic] by PageMart.”⁸ Moreover, the technical materials appended to the “reply comments”—which serve as the sole ground for MTel’s substantive comment on PageMart’s proposal—likewise state that they are “Comments on the . . . ‘Petition for Rulemaking’ . . . by PageMart.”⁹ Perhaps more significantly, however, nothing in MTel’s “reply comments” responds to PageMart’s comments on MTel’s pioneer’s preference request. PageMart’s June 1 comments included 22 pages of detailed comment on MTel’s “Nationwide Wireless Network” (NWN) concept, including

⁷ Although Section 1.415 deals with comment procedures in rulemaking proceedings, there is no functional or policy difference between rulemakings and pioneer’s preference proceedings with respect to the appropriate content of “replies.”

⁸ MTel Formal Opposition and Reply Comments, at 1.

⁹ *Id.*, Appendix A, at 1, and Appendix B, title page.

issues such as transmission speed, simulcast and multitone modulation deficiencies, capacity constraints, co-channel interference, and return link reliability interference. MTel's "reply" does not respond to these critiques—seemingly conceding their validity—but rather criticizes PageMart's March 1992 request for pioneer's preference and February 1992 petition for rulemaking. MTel's purported "reply" spends five pages summarizing its technical comments on PageMart's proposal, nine pages discussing the "innovativeness" of the proposal, and four on the "public benefits" of PageMart's PIMS service, but does not devote a single page to a rebuttal of PageMart's extensive June 1, 1992 comments on NWN.

In addition to the fact that they are by no means "reply" comments, simple procedural fairness dictates that the Commission strike MTel's purported "reply" as untimely. If the Commission permits this filing, then (1) MTel will have been granted an additional two weeks, unavailable to any other party, in which to "address the merits" of the proposals in ET Docket No. 92-100, and (2) PageMart and others will be deprived of the opportunity of a reply to MTel's comments, a procedural right which the Commission's pioneer's preference comments procedures (Section 1.402(e)) are designed to protect. The Commission must recognize MTel's "reply" for what it is—opening comments which should have been filed on June 1. Changing the caption cannot hide the fact that MTel's comments on the merits were impermissibly late, and should therefore be rejected by the Commission.

III. MTEL's FORMAL OPPOSITION MAY VIOLATE THE COMMISSION'S EX PARTE RULES FOR RESTRICTED PROCEEDINGS

Finally, it appears that MTel's filing may also be in violation of the Commission's ex parte rules. The ex parte rules provide that if a party "intends to file an opposition" which would cause the proceeding "to become restricted," then an ex parte presentation is not permitted. 47 C.F.R. § 1.1208(b)(2). Both the sheer volume of MTel's reply and opposition, together with the detailed technical materials prepared by its consultants and the fact that MTel filed formal oppositions to virtually all of the pioneer's preference requests in ET Docket No. 92-100, suggest that MTel has been working on its opposition for many months and intended all along to submit formal oppositions. Since formal oppositions in preference proceedings have the effect of terminating ex parte contacts,¹⁰ MTel's strategy in waiting to file appears to have been a calculated and intentional ploy to gain an unfair procedural advantage. Because MTel's formal opposition raises a prima facie issue of violation of Section 1.1208, the Commission should couple its rejection of

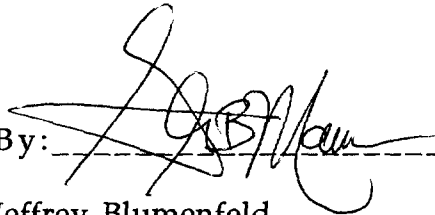
¹⁰ See Public Notice, ET Docket No. 92-100 (June 15, 1992).

MTel's pleading with an Order that MTel show cause why sanctions should not be assessed for apparent violation of the ex parte rules.

CONCLUSION

The Commission should strike MTel's June 16, 1992 "Formal Opposition and Reply Comments" and issue an Order that MTel show cause why sanctions should not be assessed for apparent violation of the ex parte rules.

Respectfully submitted,

By: -----

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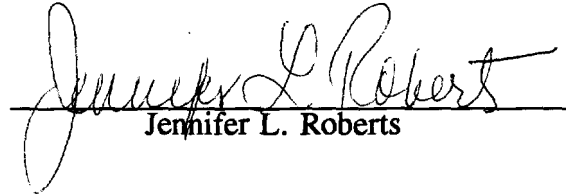
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Dated: July 1, 1992.

CERTIFICATE OF SERVICE

I, Jennifer L. Roberts, do hereby certify on this 1st day of July, 1992, that I have served a copy of the foregoing document via hand delivery to the persons listed below.



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